

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY WASHINGTON,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS & REHABILITATION, et
al.,

Defendants.

Case No. [22-cv-02454-RMI](#)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

Plaintiff, a state prisoner proceeding *pro se*, filed a civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed *in forma pauperis*.

DISCUSSION

1. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity, or from an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at § 1915A(b)(1), (2). Further, it should be noted that pleadings submitted by *pro se* parties must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” While specific facts are not necessary, the statement needs to give the defendant fair notice of the nature of the claim and the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Although a plaintiff need not include

1 detailed factual allegations in a complaint, the complaint must do more than recite elements of a
 2 cause of action and state conclusions; rather, a plaintiff must state factual allegations sufficient to
 3 raise the entitlement to relief “above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550
 4 U.S. 544, 555 (2007). A complaint must proffer “enough facts to state a claim to relief that is
 5 plausible on its face.” *Id.* at 570. The Supreme Court recently explained this standard: “[w]hile
 6 legal conclusions can provide the framework of a complaint, they must be supported by factual
 7 allegations . . . [and] [w]hen there are well-pleaded factual allegations, a court should assume their
 8 veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft*
 9 *v. Iqbal*, 556 U.S. 662, 679 (2009).

10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
 11 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
 12 the alleged deprivation was committed by a person acting under the color of state law. *West v.*
 13 *Atkins*, 487 U.S. 42, 48 (1988).

14 2. Legal Claims

15 Plaintiff alleges that the defendant failed to protect him from an assault by other inmates
 16 and verbally harassed him. The Eighth Amendment requires that prison officials take reasonable
 17 measures to guarantee the safety of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). In
 18 particular, prison officials have a duty to protect prisoners from violence at the hands of other
 19 prisoners. *Id.* at 833; *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015); *Hearns v. Terhune*, 413
 20 F.3d 1036, 1040 (9th Cir. 2005). The failure of prison officials to protect inmates from attacks by
 21 other inmates or from dangerous conditions at the prison violates the Eighth Amendment when:
 22 (1) the deprivation alleged is, objectively, sufficiently serious; and (2) the prison official is,
 23 subjectively, deliberately indifferent to inmate health or safety. *Farmer*, 511 U.S. at 834. A prison
 24 official is deliberately indifferent if he or she knows of, and disregards, an excessive risk to inmate
 25 health or safety by failing to take reasonable steps to abate it. *Id.* at 837.

26 Allegations in a *pro se* complaint sufficient to raise an inference that the named prison
 27 officials knew that plaintiff faced a substantial risk of serious harm and disregarded that risk by
 28 failing to take reasonable measures to abate it state a failure-to-protect claim. *See Hearns*, 413

1 F.3d at 1041-42 (citing *Farmer*, 511 U.S. at 847).

2 Allegations of verbal harassment and abuse fail to state a claim cognizable under 42 U.S.C.
3 § 1983. *See Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997) *overruled in part on other*
4 *grounds by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008); *see, e.g., Keenan v. Hall*, 83
5 F.3d 1083, 1092 (9th Cir. 1996), amended 135 F.3d 1318 (9th Cir. 1998) (disrespectful and
6 assaultive comments by prison guard not enough to implicate the Eighth Amendment);
7 *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (directing vulgar language at prisoner
8 does not state constitutional claim). This is so even if the verbal harassment is racially motivated.
9 *See Hoptowit v. Ray*, 682 F.2d 1237, 1252 (9th Cir. 1982) (federal court cannot order guards to
10 refrain from using racial slurs to harass prisoners).

11 Plaintiff alleges that Defendant Sergeant Howard told other inmates that he was a sensitive
12 needs yard inmate in need of protective custody. Plaintiff was released to the general population
13 yard on July 22, 2021, where he was immediately assaulted and injured by three or more other
14 inmates. This is sufficient to proceed with a claim against Howard.

15 Plaintiff also alleges that Defendant Howard harassed him using unprofessional and
16 disrespectful language. Pursuant to the legal standards set forth above, this fails to state a claim.
17 The complaint is dismissed with leave to amend. Plaintiff should either present more allegations
18 regarding the harassment or not include this claim.

19 Plaintiff also identifies the prison and the Correctional Peace Officers Association union as
20 Defendants, but does not include any specific allegations linking them to the constitutional
21 deprivation. In an amended complaint, Plaintiff should either present more allegations or not
22 include them.

23 CONCLUSION

24 1. The Complaint is **DISMISSED** with leave to amend in accordance with the standards
25 set forth above. The amended complaint must be filed within **twenty-eight (28) days** of the date
26 this order is filed, and must include the caption and civil case number used in this order and the
27 words “AMENDED COMPLAINT” on the first page. Because an amended complaint completely
28 replaces the original complaint, Plaintiff must include in it all the claims he wishes to present. *See*

1 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may not incorporate material
2 from the original Complaint by reference. Failure to amend within the designated time will result
3 in dismissal of this case.

4 2. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
5 informed of any change of address by filing a separate paper with the clerk, headered "Notice of
6 Change of Address," and must comply with the court's orders in a timely fashion. Failure to do so
7 may result in dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil
8 Procedure 41(b).

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10 **IT IS SO ORDERED.**

11 Dated: May 6, 2022

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15 ROBERT M. ILLMAN
16 United States Magistrate Judge
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